

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Fitchburg Gas and Electric Light Company) D.T.E. 99-118

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**OPPOSITION TO THE MOTION OF FITCHBURG GAS AND ELECTRIC
LIGHT COMPANY'S FOR A REVISED PROCEDURAL SCHEDULE**

Pursuant to 220 C.M.R §1.06(6)(b)(2) and 220 C.M.R §1.06(6)(c)(3), the Attorney General opposes the motion of Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") to revise the procedural schedule. As grounds for this opposition, the Attorney General notes that the complaint in this case seeking rate relief on behalf of the consumers in the Commonwealth under G. L. c. 164, § 93 was filed over one year ago, and the Company has had over thirteen months of actual notice to prepare the material necessary to defend against the Attorney General's allegations. To the extent that the procedural schedule has now become unwieldy or unworkable, the Attorney General submits that these problems have been caused by Fitchburg's refusal to comply fully and completely with discovery requests. The alternate procedural schedule now proposed by the Company is merely interposed for purposes of delay, and the request to enlarge the discovery period should be denied.

I. INTRODUCTION.

A. Procedural History.

On December 31, 1999, the Attorney General filed a complaint pursuant G.L. c. 164, § 93 alleging that the electric distribution rates charged by the Company were unreasonably high and should be reduced. More than ten months later, by notice dated November 15, 2000, the Department scheduled a public hearing on the complaint for Thursday, December 14, 2000, in Fitchburg, Massachusetts. A procedural conference was held on December 19, 2000.

On January 5, 2001, the Hearing Officer issued a memorandum setting forth the procedural schedule: it required the Company to file an Answer by January 16, 2001, commenced the discovery period, set deadlines for the submission of pre-filed testimony and briefing and scheduled evidentiary hearings for April 2-3, 2001. After having been served with the procedural memorandum after 5:00 pm on Friday, January 5, 2001, the Attorney General initiated discovery on Monday, January 8, 2001, and issued a second set of information requests on Wednesday, January 10, 2001. In these requests the Attorney General sought to discover the essential items for a cost of service analysis. On January 17, 2001, the Attorney General received a copy of the Company's motion to "dismiss" accompanied by a proposed answer. On January 18, 2001, the Company served a response to the Attorney General's second set of information requests, and filed a motion to define the scope of the proceedings.

The Attorney General opposed the motion to dismiss on January 22, 2001, and filed a cross motion for leave to amend the complaint. The Company did not file an opposition to the Attorney General's motion to amend the complaint. The Attorney General also opposed the motion to define the scope of the proceedings and filed a cross motion to compel discovery responses on January 25, 2001. The Company served an opposition to the motion to compel, but the Department has not yet acted on this matter.⁽¹⁾ Without the benefit of the discovery that the Company has withheld, the Attorney General filed limited testimony on February 9, 2001.⁽²⁾ As explained fully below, the Attorney General now opposes Fitchburg's motion to revise the procedural schedule.

II. ARGUMENT.

A. The Department's Original Discovery Schedule Should be Obeyed.

The Company has raised due process concerns regarding the issues addressed by the Attorney General's discovery requests. Essentially, Fitchburg is recycling an argument already briefed extensively before the Department in connection with the Company's earlier filed motion to define the scope of the proceedings. Here, as in the motion to define scope, the Company's arguments fail to address, confront or much less overcome the following facts that undermine its due process claims:

- 1) Fitchburg had actual notice of the Attorney General's complaint over a year before the Attorney General issued his discovery requests in January of 2001;
- 2) The public hearing notice dated November 15, 2000, contained the following announcement: "[t]he Attorney General claims that the Company's electric distribution rates for calendar year 1999 were excessive. General Laws. c. 164, § 93 permits the Department to order a reduction or change in the price of electricity after notice and hearing";
- 3) At the procedural conference held on December 19, 2000, counsel for Fitchburg, Paul Connolly, explained that the company has long understood the full cost of service issues needed for the Company's defense by stating "[w]e thought the cleanest and best way to

respond to [the Attorney General's] petition was just to file a rate case" (Hearing transcript, 12/19/00, p. 16); and,

4) At the December 14, 2000, public hearing, George Gantz, a representative of Fitchburg, described the nature of issues related to the Attorney General's petition: "[n]ow, I want to talk about the distribution base rates, the subject of this proceeding. [] Distribution base rates are not changed on a frequent basis. They are changed pursuant to a base rate case which is an intensive and comprehensive review where all factors are looked at together." (Hearing transcript, 12/14/00, p. 14).

All these considerations taken together belie the Company's arguments that it did not have sufficient notice or understanding of the issues to prepare a cost of service study or other materials necessary for its defense.

The Company also attempts to excuse or justify its inaction by referring to statements made by an Assistant Attorney General during the procedural conference. Those statements, characterizing the strength of the evidence as alleged in the complaint as constituting a *prima facie* case, were made almost a year after the complaint was served and cannot logically form the basis for any inaction on the part of the Company. The Company cites Boston Gas Co., D.P.U. 88-67 (Phase I) as "precedent" for its assertion that it cannot meet the discovery schedule because a revenue requirement and rate design for residential customers would take over 3 ½ months to complete. (Fitchburg's motion to revise the procedural schedule, p. 4). Assuming, *arguendo*, that the scope of the study would be the same for Fitchburg as it was for Boston Gas, the Company could have filed a § 94 rate case as early as April 2000.⁽³⁾ The Company, however, did not take the initiative to prepare and file a cost of service study as a way to preempt the § 93 case, but instead apparently relied on administrative delay as a way to expand the time period during which it could collect rates the Attorney General has determined to be excessive. In sum, Fitchburg has offered no convincing argument to justify any further delay in these proceedings.

III. CONCLUSION.

For these reasons, the Department should deny the motion to revise the procedural schedule. The existing procedural schedule offers the parties an opportunity for a full and fair hearing. In order to facilitate the discovery process, the Attorney General requests that the Department rule on the pending motion to compel discovery responses and provide the Attorney General with the opportunity to file additional testimony concerning, *inter alia*, the cost of capital and rate design based on the Company's responses. The Company must not be allowed to prepare its defense to the allegations in the complaint while simultaneously blocking the Attorney General's discovery designed to understand the nature of this defense.

RESPECTFULLY SUBMITTED,

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1. As a part of the relief sought in the motion to compel, the Attorney General requested that the deadline for his pre-filed testimony be extended to account for each day of delay caused by the Company's failure to respond to discovery since January 18, 2001.

2. The Attorney General reserves the right to supplement his testimony in this matter based upon the Company's failure to *fully* respond to the Attorney General's information requests within the time set by the Hearing Officer. As of February 9, 2001, the filing date for testimony, the Attorney General has not received any response to information requests AG1-12 and 13 (filed 1/8/01) and AG2-1, 2, 3, 4, and 5 (filed 1/10/01). In addition, the Company has not provided information regarding year 2000 costs and revenues. (*See* AG1-2, 3, 6-7, 17, 19-26, 28-31, 33-34, 36-38, 40-41, 44-46, 49-51, 53, 55-61, 64-70, 74, 77-78, 83-84, 87). The Company has objected and refused to fully answer Attorney General information requests AG2-6 through 2-14. This failure to provide the requested information should subject the Company's case to rejection or dismissal. Western Massachusetts Electric Company, D.P.U. 1300, pp. 12-13 (1983). *See also* 220 C.M.R. 1.06(6)(c)1 (the Attorney General is entitled "to gain access to all relevant information in an efficient and timely manner"); G.L. c. 30A, §11(3) ("Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence."); Fitchburg Gas and Electric Light Company, D.P.U. 84-145-A, pp. 41-42 (1985) (the Company's reluctance to respond fully and in a timely manner to legitimate discovery requests prejudiced the Attorney General's right to a full and fair hearing and seriously impeded the investigation, resulting in dismissal of an issue.)

3. According to Fitchburg's counsel, the filing of a new rate case would have been "the cleanest and best way to respond to [the Attorney General's] petition" (Hearing transcript, 12/19/00, p. 16).